IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/12/2002

Coram

The Hon'ble Mr. Justice V.KANAGARAJ

C.R.P. (NPD) No.535 of 2002

Venkatalakshmi @ Rathnamma .. Petitioner

-Vs-

1.Bayamma
2.Munireddy
3.Lakshmi
4.Chinna Venkatamma
5.Muniamma
6.Venkatagiriappa
7.Akkachiamma
8.Pappamma
9.Munilakshmiamma
10.Akkiamma
11.Venkatesh
12.Devaiah
13.Minor Srinivasan

(Minor 13th respondent
rep. by mother and next
friend R9) .. Respondents

Civil Revision Petition preferred against the fair and decretal order dated 17.12.1996 made in C.M.A.No.16 of 1996 on the file of the Subordinate Judge, Hosur confirming the fair and decretal order dated 1 8.03.1994 made in I.A.No.253 of 1990 in O.S.No.89 of 1978 on the file of the District Munsif, Hosur.

!For Petitioner .. Mr.C.R.Muralidharan

^For Respondents .. Mr.V.Nicholas for R3

No appearance for R2
and R4 to R13

:ORDER
This civil revision petition is directed against the fair and decretal order dated 17.12.1996 made in C.M.A.No.16 of 1996 by the Court of

Subordinate Judge, Hosur thereby confirming the fair and decretal order dated 18.03.1994 made in I.A.No.253 of 1990 in O.S.No.89 of 1978 by the Court of District Munsif, Hosur on certain grounds, such as that both the Courts below have erred in rejecting the application to set aside the exparte decree made against the petitioner, particularly when the petitioner was shown to be a minor on the date of passing of the exparte decree and the petitioner not being aware of the pendency of the litigation; that the Courts below have erred in holding the contention of the petitioner regarding her relationship with her mother was not cordial is unbelievable and has rejected the same; that the 5th defendant to the suit, the petitioner's mother was appointed as guardian in the suit and she engaged an Advocate and filed the written statement and subsequently, she did not evince any interest in the suit when it was taken up for trial and they both have been set exparte, while other defendants contested the suit resulting in the suit being decreed on 07.06.1982 which the Courts below has failed to appreciate; that the Courts below have failed to appreciate that the petitioner was born on 22.10.1962 and she attained majority on 22.10.19 80 and despite the same, the first respondent/plaintiff had failed to take any step in the suit to declare the petitioner as a major and even in the decree dated 07.06.1982, the petitioner was shown only as a minor; that the Courts below have failed to note that the subsequent appeal in A.S.No.76 of 1982 filed by the other respondents before the appellate Court, the petitioner has been shown only as a minor and not as a major and notice of appeal was not served on her and therefore, she could not appear in the said appeal at all; that the petitioner came to know of the decree passed in O.S.No.89 of 1978 only on 21 .02.1990 when she was informed of the petition filed in I.A.No.861 of 1987 by the first respondent for a final decree; that immediately the petitioner after knowledge, filed I.A.No.253 of 1990 in the suit which the Court has failed to appreciate it; that the Courts below have failed to appreciate that the petitioner is entitled to 1/3rd share in all the properties of Chinna Muni Reddy, which was accepted by the first respondent/ plaintiff in an earlier suit in O.S.No.44 of 1974 on the file of District Munsif, Hosur and suppressing the same, the first respondent has filed the present suit and hence, she deliberately did not take any step to declare the petitioner as major in a fraudulent manner; that the Courts below erred in holding that the application under Order IX Rule 13 C.P.C. is not maintainable and the remedy lies only by way of appeal when the petitioner was only set exparte in the suit as it abundantly comes to be known; that the lower appellate Court has not appreciated the decision reported in A.I.R. 1969 Orissa 52 (Manoranjan Samanta Kumar v. V.Brundabati Veergam) but has erred in relying on the decision reported in A.I.R. 1985 Calcutta 164 (Partosh Kumar Gangully v. Smt. Sitala Bala Ghosh and others) and A.I.R. 1976 Madras 262 (Sherija Bi v. V.Pillai) thereby in view of the fact that the petitioner was not aware of the proceedings and was therefore unable to appear in the suit and apply for discharge of the guardianship on such and other grounds, the petitioner would pray to set aside and revise the fair and decretal order dated 17.12.1996 made in C.M.A.No.16 of 1996 by the Court of Subordinate Judge, Hosur thereby confirming the fair and decretal order dated 18.03.1994 made in I.A.No.253 of 1990 in O.S.No.89 of 1978 by the Court of District Munsif, Hosur allowing the civil revision petition.

2.Since it is a matter of vital importance and an order made

in the above C.R.P. at the earliest would serve the ends of justice, this Court expediting the procedures, has decided the matter in an expeditious manner.

3.It is a case concerned with the petitioner, who was a minor at the time the first respondent filed the suit in the Court of original jurisdiction in O.S.No.89 of 1978, which is a suit for partition and separate possession of the suit properties said to have been left by one Chinna Muni Reddy in which the petitioner is said to be having 1/3 rd definite share, no mention need be necessary that the petitioner is a vitally interested party to the suit. The petitioner is the 6th defendant to the suit and since she was a minor at the time of filing of the suit, the first respondent/plaintiff has taken steps to appoint her mother as a guardian of the petitioner and in fact her mother is also a party to the suit proceedings as the 5th defendant.

4.In these circumstances, the petitioner's case is that she attained majority as on 22.10.1990, since she was born admittedly on 22.10.1 962 and that the suit was decreed exparte not only against her but also against her mother, the 5th defendant, while the other defendants contesting the suit, the decree as such, has been passed on 07.06.198 2.

5.The petitioner would come forward to take up the plea that she did not know the suit proceedings at all, nor had there been cordial relationship in existence between herself and her mother and hence, even though initially her mother as a guardian, appointed an Advocate to defend the suit, at a later stage, she had not taken care of the same as a result of which, the petitioner has been set exparte and only when the notice was served on a final decree petition taken out by the first respondent/plaintiff in I.A.No.861 of 1987 on 28.02.1990, she became aware of what had happened and took immediate steps to file an application under Order IX Rule 13 C.P.C. to set aside the exparte decree passed against her under the pretext that she was still a minor, even though on the date of passing of the decree, that was on 07.06.1982, she had very well become a major and therefore, the exparte decree passed by the lower Court so far as the petitioner is concerned, is a nullity.
6.On the part of the first respondent/ plaintiff, she would come forward to deny the allegation on the ground that her mother, as the guardian of the petitioner, appointed an advocate and also filed a written statement and her mother herself was a party to the suit, being the 5th defendant; that the decree dated 07.06.1982 was not an exparte decree but a contested one by the other defendants; that it is false to allege on the part of the petitioner that she was unaware of the decree and the very suit proceedings till the date of service of notice in I.A.No.861 of 1986 on 28.02.1990; that it is further false to allege that the petitioner is entitled to 1/3rd share of the suit properties; that the decree passed by the trial Court being a legally binding one on the petitioner, because of her non appearance would not become a nullity and since only after taking such steps and exhausting the procedures the decree has been passed it would prejudice the decree that has been passed and therefore even an application to be filed under Order IX Rule 13 C.P.C. which has been resorted to on the part of the petitioner is irregular and unacceptable and the remedy lies only in preferring an appeal before the appellate forum as against the decree and on

such grounds, the first respondent/plaintiff would ultimately pray to dismiss the application.

7.At the outset, it has to be decided whether an application, under Order IX Rule 13 C.P.C., as it came to be filed by the petitioner, could be taken as a proper step or proceeding in law? A cursory glance made into the said provision of law wherein the language is complete and clear and unambiguous to the effect that 'in any case in which a decree is passed exparte against a defendant, he may apply to the Court by which the decree was passed for an order to set aside' and therefore, there is absolutely no impediment caused on the part of the petitioner to have resorted to the said provisions of law for filing an application to set aside the exparte decree as passed by the trial Court. Since it is clear from the language employed in the Section, it could be presumed that even if other defendants are in the suit and if the said suit has been decided against them in a contested manner on merits, if no participation is there on the part of any one or other defendants, such a defendant who has been set exparte in the suit, is at liberty to file an application under order IX Rule 13 C.P.C. and hence, this question regarding the maintainability of the application filed by the petitioner before the trial Court under Order IX Rule 13 C.P.C. is decided as maintainable in law.

8.The next question that is to be decided in this case is, whether on such plea taken out on the part of the petitioner that she was a minor when the suit was filed in the year 1978, and that she had become a major in the year 1980 and even though her mother was appointed as her guardian to defend the suit on her behalf as the 6th defendant in the suit, the petitioner would come forward to allege that no cordial relationship existed between herself and her mother and that she was not at all aware of the pending of the suit nor informed of anything about the same and therefore, only on service of the final decree notice in the year 1990, immediately coming to the knowledge of the dismissal she filed the petition to set aside the exparte decree. The petitioner's case is that two years after she had attained majority in the year 1982, the suit had been decided exparte against her as though she was a minor and the same is a nullity and therefore she would plead to set aside the exparte decree and permit her to participate in the further proceedings of the suit, particularly in view of the fact that she is entitled to a definite 1/3rd share in all the properties of the deceased Chinna Muni Reddy.

9.It is relevant to consider that this application has been filed 1 2 years before 1990 and the said application having been dismissed by the trial Court an appeal has also been preferred by the petitioner and the appellate Court has passed an concurring order accepting the conclusions arrived at by the trial Court as a result of which the petitioner has come forward to file the above revision petition before this Court for all the grounds such as those which have been mentioned supra.

10.It is a suit filed by the first respondent herein, needless to mention that she has made the petitioner a party to the suit proceedings and hence impleaded her as the 6th defendant to the suit. The first respondent/ plaintiff has taken steps to appoint her mother as the guardian of

the minor defendant petitioner resulting in the 5th defendant being appointed the guardian of the 6th defendant who conducted the case on her behalf. Since the plaintiff has come forward to seek relief in the Court as against the defendants, she should have also been careful only to see that she gets the decree legally passed in a binding manner against all the defendants in the suit, lest, she may not be able to enjoy the fruits of the decree if there is a nullity or inconsistency or infirmity in the decree.

11.No doubt need be entertained regarding the majority attained by the petitioner in the year 1980 since she has offered the exact date of birth as in the year 1962 and therefore, when the decree was passed in the year 1982, roughly about two years later, the 6th defendant, the petitioner, having attained majority in 1980 itself, it is the duty and responsibility of the plaintiff to see that she gets a proper decree against proper parties in the proper manner, lest, she may not be able to enjoy the fruits of the decree in a peaceful way. At this juncture, since it is the plaintiff, who is the interested party in getting the decree, she cannot simply throw the burden on the defendants for having not come forward to declare the majority as though it is the minor defendant who has filed the suit seeking some reliefs, especially in a case of this nature wherein the minor pleads no knowledge of the very suit filed by her mother or even the decree passed against her, unless the plaintiff is in a position to prove to the effect that inspite of knowledge of the decree passed in the pending suit and that she had deliberately failed and neglected to implead her to the proceedings of the suit, the Court has to presume that the petitioner who was minor had no knowledge of the suit proceedings or the passing of the decree.
12.Since no authenticated evidence has been placed on the part of the first respondent/plaintiff, to the plea taken on the part of the petitioner/6th defendant that since being a minor at the time of filing of the suit and inspite of having attained majority, since she was not given to understand anything about the suit proceedings, much less, the decree passed on 07.06.1982, the version of the petitioner has to be accepted, in order to give her an opportunity to be heard in the suit wherein her vital and substantial interests are at stake, and therefore in these circumstances, it is always desirable to afford an opportunity for the petitioner to have participation in the suit proceedings, particularly in view of the fact that most part of the trial procedure has been exhausted when the petitioner was set exparte and permitting the suit to be proceeded from there, so as to pass a decree on merits and in accordance with law which would be binding on all the parties and therefore, the decision taken on the part of the trial Court and the first appellate Court as well in a slip-shod manner, is not proper and erroneous in law, since the knowledge of the suit proceedings and the decree passed in the suit came to her only on the service of the notice in the final decree petition on 28.02.1990 and since immediately thereafter, proceedings have been initiated to set aside the exparte decree, it is only proper to have allowed the petitioner to participate in the trial proceedings and decision taken on merits and in accordance with law thus giving full opportunity for the petitioner to be heard.

13.The trial Court which dealt with the Interlocutory Application filed by the petitioner and the first appellate Court which has

passed an order adhering the trial Court, have not assigned proper reasons for the petitioner to have had knowledge prior to the date of 28.02.1 990, when she is said to have been served with the notice of the final decree petition and without having established this fact, the conclusion arrived at bluntly refusing the petitioner the opportunity to be heard could only be held to have been done in violation of the high principles of natural justice and therefore, both the orders passed by the District Munsif, Hosur and the Subordinate Judge, Hosur become only liable to be set aside.

In result,

(i) The above civil revision petition succeeds and the same is allowed;

(ii) The order dated 18.03.1994 made in I.A.No.253 of 1990 in O.S.No.89 of 1978 by the Court of District Munsif, Hosur and the order dated 17.12.1996 made in C.M.A.No.16 of 1996 by the Court of Subordinate Judge, Hosur thereby confirming the lower Court order and dismissing the application and the appeal filed by the petitioner are set aside;

(iii)The decree dated 07.06.1982 passed by the trial Court in O.S.No.89 of 1978 is also set aside;

(iv) The trial Court is directed to conduct a fresh trial into the facts and circumstances of the suit and decide the suit on merits and in accordance with law with due opportunity for all the parties including the petitioner to participate in the proceedings;

(v) since it is a long pending matter, it has become incumbent on the part of this Court to further direct the trial Court to take up the suit out of turn, posting the same in the emergent list and expediting the trial procedures so as to complete the trial and deliver the judgment within six months from the date of receipt of the copy of this order.

(vi) There shall be no order as to cost.

Index:Yes
Internet:Yes
sbi
To
1. The Subordinate Judge,
Hosur.

2. The District Munsif,
Hosur.